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No. 214.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

FRED C. FISHER AND CHARLES C. COHN, ON BEHALF OF FELIX BARCELON, PLAINTIFFS IN ERROR,

v.

COLONEL DAVID J. BAKER, JR., AND CAPTAIN JOHN DOE THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

The question here is whether under the act of Congress of July 1, 1902, section 5 (32 Stat., 691, 692), the governor-general of the Philippine Islands has the right to suspend the writ of habeas corpus free from judicial inquiry as to the occasion and necessity for such action. The court are not interested to consider or determine any doubtful question of fact. Nevertheless, it is desirable to show from the contents of the record just what the situation is from which the legal inquiry arises.

1. It seems that the real petitioner, Barcelon, repudiates his lawyers, the plaintiffs in error, and

disclaims the action which they have assumed to initiate in his behalf. It seems that they are not really his lawyers, but are rather the counsel of a certain Don Pedro Roxas, out of whose prosecution by the Government the present proceedings grow. The petitioner, Barcelon, was a witness for the prosecution in that case.

The answer of the respondents states (Rec., p. 10), without contradiction, that Fisher and Cohn are attorneys for Roxas, and in the prosecution of Roxas, Fisher conducted the examination for the defense at the preliminary investigation (p. 5). The answer asserts that this application was made without the knowledge, consent, or approval of Barcelon and against his wishes, and submits telegrams from the governor of the province of Batangas, from Captain Thompson, and from a notary, showing that Barcelon had so stated to them and made affidavit accordingly before the notary (pp. 9, 10, 12, 13). It is true that the plaintiffs in error subsequently filed in the case a copy of an authorization from Barcelon of later date than the telegrams (p. 22).

2. Barcelon appears to be merely under the surveillance and care of Captain Thompson. He does not consider himself under detention. He is satisfied to remain in Thompson's house, where he is a gratuitous lodger and not a prisoner. This is necessary for his protection from threats, intimidations, and possible assassination. (Answer and accompanying documents, *ut sup.*) But *per*

contra the authorization referred to approves of all the acts of Fisher and Cohn "to obtain my true liberty from this imprisonment in which I find myself" (p. 22).

3. Roxas is a wealthy landowner, Barcelon a tenant farmer on his estate. Roxas, with his manager, his son, Barcelon, and others, in April, 1905, made a tour of inspection of his estates in the province of Batangas. When they came near a certain place or district in the mountains called Alasas, the son of Roxas (according to the original story of the witness), gave Barcelon 20 pesos and sent him with three others of the party to give the money to Ramos, a bandit of that region, who seems to have been levying and receiving contributions, and Barcelon delivered this money to Ramos, and his three companions witnessed the transaction. Barcelon's statement or declaration to this effect was made on April 15, 1905, in the presence of Mr. Harvey, assistant attorney-general of the Philippines, and other officers or employees of the Government (pp. 7, 13, 20). It seems that Roxas was thereupon prosecuted under an act of the Philippine government (act of April 27, 1904, No. 1121, sec. 3, amending sec. 4 of an act defining the crime of brigandage, etc.; 3 Laws Phil. Com., 318), which provides:

> Every person knowingly aiding or abetting such a band of brigands as that described in section one by * * * procuring for them supplies of money, food,

> clothing, * * * or by furnishing the same to them, * * * shall, upon conviction, be punished by imprisonment for not less than ten years and not more than twenty years.

I assume or suggest that this was the law under which Roxas was charged. The record is silent on that point. At all events, at the preliminary investigation of the case against Roxas (whatever the charge was) in the Court of First Instance in the province of Batangas (p. 3 *et seq.*) Barcelon, being a witness for the prosecution and under direct examination, denied that he knew Ramos or had seen him, described the trip of inspection over the estate without giving the incident of the delivery of the pesos, and denied that they had visited Alasas on that day. And then he testified on cross-examination that his original declaration (p. 13) had been extorted from him by beating and cruel treatment at the hands of an officer of the government or constabulary (who chanced to have the same name as the bandit) in the hold of the steamer which brought him to Batangas from the place of his original detention as a witness. Upon questioning by the judge of first instance, Barcelon confirmed his entire statement just then made and specifically reiterated the declaration that he had not seen "Julian Ramos, the so-called leader of brigands," and that Roxas did not give him the sum of 20 pesos. Subsequently—that is, on May 8, 1905—in the "Investigation of Witnesses in the

Roxas Case" (p. 14 *et seq.*) Barcelon returned to his original declaration and gave the same story in greater detail, and declared that—

> The reason why I told the story in the court in Batangas is that there was some person who came to me when I was in the *cuartel* at Batangas and told me to tell the court that the statement that I had made in Lipa was false. I do not know who the person was, as it was at night. * * * He told me to tell the court that that statement that I made in Lipa was a lie, and to tell them that I had been beaten by Lieutenant Ramos in order to make me make that statement. * * *
>
> Question. Were you afraid for any reason not to do what that man told you to do?
>
> Answer. Yes, sir; I was afraid of him because he told me he would kill me if I did not tell the judge what he said (pp. 15, 16).

On August 2, 1905, the plaintiffs in error filed their petition in the Supreme Court of the Philippine Islands for a writ of habeas corpus in behalf of Barcelon, alleging that Barcelon is restrained of his liberty by the Philippine constabulary without just grounds and simply in order to cause and persuade him to retract his statements before the Court of First Instance; that there is no rebellion, insurrection or invasion whatever in the province of Batangas; that the courts of law in that province are in the full and complete exercise of their

functions, wherefore the petitioners pray that the writ issue, etc. (pp. 1, 2).

That court issued a rule to show cause to which an answer was put in (pp. 9, 10); heard the application, and then denied it on the ground that under the act of Congress the action of the Philippine authorities in proclaiming the fact that an open insurrection existed in the provinces of Cavite and Batangas and suspending the writ of habeas corpus therein was final and conclusive and was not subject to judicial review. (Opinion, pp. 22–42; Willard, J., dissenting, pp. 42–44.) The case was then brought here by writ of error, the assignments being, in brief, that the Supreme Court of the islands erred in holding that by the act of Congress the governor and Commission are the sole and exclusive judges of when and where the privileges of the writ may be suspended, and in holding that the action of the Philippine authorities in suspending the writ in said provinces is not subject to judicial review, and in not holding that the suspension should be annulled in the event that insurrection, invasion or rebellion does not exist as a fact in said parts of the islands (pp. 46–47).

The action of the Philippine authorities was as follows: On January 31, 1905, the Philippine Commission adopted the subjoined resolution (Rec., pp. 10–11, 24):

> Whereas certain organized bands of ladrones exist in the provinces of Cavite and

Batangas who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their band, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrifying the law-abiding and inoffensive people of those provinces; and

Whereas these bands have in several instances attacked police and constabulary detachments and are in open insurrection against the constituted authorities; and

Whereas it is believed that these bands have numerous agents and confederates living within the municipalities of the said provinces; and

Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

Now, therefore, be it resolved, That, the public safety requiring it, the civil governor is hereby authorized and requested to suspend the writ of *habeas corpus* in the provinces of Cavite and Batangas.

On the same day the following proclamation was issued (pp. 11, 24–25):

Whereas certain organized bands of ladrones exist in the provinces of Cavite and Batangas, who are levying forced contributions upon the people, who frequently require them, under compulsion, to join their

bands, and who kill or maim in the most barbarous manner those who fail to respond to their unlawful demands, and are therefore terrorizing the law-abiding and inoffensive people of those provinces; and

Whereas these bands have in several instances attacked police and constabulary detachments, and are in open insurrection against the constituted authorities, and it is believed that the said bands have numerous agents and confederates living within the municipalities of the said provinces; and

Whereas, because of the foregoing conditions, there exists a state of insecurity and terrorism among the people, which makes it impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers:

In the interest of the public safety it is hereby ordered that the writ of *habeas corpus* is from this date suspended in the provinces of Cavite and Batangas.

LUKE E. WRIGHT,
Civil Governor.

Section 5 of the act of Congress of July 1, 1902, as cited above, provides that "the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President or by the governor with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist."

ARGUMENT.

I.

AS TO JURISDICTION.

The court will notice of its own motion a defect of jurisdiction patent on the record. The petitioners have mistaken their remedy. They have come up on writ of error and should have come by appeal.

Section 10 of the Philippine act of July 1, 1902 (32 Stat., 691, 695), provides:

> That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; *and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and*

> *by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States.*

It is well settled that an order of a Circuit Court or District Court of the United States upon an application for a writ of habeas corpus can only be reviewed by appeal and not by writ of error.

In *In re Morrissey* (137 U. S., 157, 158), decided before the passage of the Circuit Court of Appeals act, the court said:

> This case, appealed from the Circuit Court for the Eastern District of Missouri, presents, like that of *Grimley, petitioner*, just decided, a question arising on *habeas corpus* as to the right of the petitioner, an enlisted soldier, to be discharged from military custody. An effort was made to bring this case here by writ of error; but that was abandoned and an appeal rightfully substituted. (*In re Neagle*, 135 U. S., 1, 42.)

In *Rice* v. *Ames* (180 U. S., 371, 373–374) the court said:

> Motion is made to dismiss the appeal upon the ground that there is no provision of law allowing an appeal in this class of cases. Prior to the Court of Appeals act of 1891 provision was made for an appeal to the Circuit Court in *habeas corpus* cases "from the final decision of any court, justice, or judge inferior to the Circuit Court" (Rev. Stat., sec. 763), and from the final decision of such Circuit Court an appeal might be taken

to this court. (Rev. Stat., sec. 764, as amended March 3, 1885, c. 353, 23 Stat., 437.)

The law remained in this condition until the Court of Appeals act of March, 1891, was past, the fifth section of which permits an appeal directly from the District Court to this court "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question." In this connection the appellee insists that an appeal will not lie, but that a writ of error is the proper remedy. In support of this we are cited to the case of *Bucklin* v. *United States* (159 U. S., 680), in which the appellant was convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed, upon the ground that criminal cases were reviewable here only by writ of error. Obviously that case has no application to this, since under the prior sections of the Revised Statutes, above cited, which are taken from the act of 1842, an *appeal* was allowed in *habeas corpus* cases. The observation made in the *Bucklin* case that "there was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error," may be supplemented by saying that it was no purpose of the act of 1891 to change the forms of remedies theretofore pursued.

(*In re Lennon*, 150 U. S., 393; *Ekiu* v. *United States*, 142 U. S., 651; *Gonzales* v. *Cunningham*, 164 U. S., 612.)

It is well settled that habeas corpus is a civil and not a criminal proceeding, although instituted to arrest a criminal prosecution. (*Ex parte Tom Tong*, 108 U. S., 556, 559; *Farnsworth* v. *Montana*, 129 U. S., 104, 113; *Cross* v. *Burke*, 146 U. S., 82, 88.)

Since, then, the plaintiffs in error are not properly before the court, it seems clear that the writ of error must be dismissed for lack of jurisdiction.

II.

ON THE ESSENTIAL QUESTIONS.

The proclamation of Governor Wright sets forth the facts with particularity, and they are sufficiently impressive and convincing. This very case well illustrates the situation, and goes to prove the truth of the facts set forth in the proclamation. The record contains significant evidence of what was really going on in Batangas, despite the conflicting declarations of the witness, and even if a court can not regard the Government's view and theory as strictly proved. A landlord of large estates (it is charged) makes a contribution of money to the leader of one of these bands, doubtless under the same obvious compulsion which brought blackmail from the Lowlander to the Highland reiver, who otherwise carried off herds and crops. An igno-

rant and terrified witness receives some hint of vengeance, which leads him to change his story, and when he returns to his original tale his life is probably in danger.

If he is taken from his so-called detention, which is really his protection, the same insidious power may secretly abduct and punish him. I by no means intend to suggest that the habeas corpus proceeding is in itself a plot for this purpose, but it is curiously adapted and might be completely effective to that end. It is manifest that constabulary officers would have no motive to maintain the Government policy of breaking up ladrones and punishing those who aid them by suborning witnesses and treating them cruelly. A Government officer, military or civil, would be far less likely, it is certain, to pursue such a lawless and violent course than men under the ban of the law and bred in a vicious system would be to apply the covert threat of vengeance. So, on the inherent probabilities as to the truth, it seems clear that this case itself shows the necessity for Governor Wright's proclamation and action.

Opposing counsel cite official documents in support of the contention that some months after the proclamation was issued and after the events in this case occurred, but before the hearing on habeas corpus, the insurrection was checked. This amounts to the argument that as soon a Government officer reported to his superior that they were handling the matter satisfactorily and making

progress, the proclamation suspending the writ should have been revoked. It was revoked in the following October (see proclamation below); and if we are at all correct in our contentions the time to revoke suspension as well as to suspend is properly determined by the executive authority and neither by the statements of administrative reports nor legal argument based upon those statements. By their own showing counsel concede that for four months after the proclamation was issued sharp military work was needed, and then undertake to say, because they think so, that this week or this month, rather than the period deliberately fixt by the executive, marks the entire cessation of the insurrection. I may also note that Colonel Baker's letter (see Appendix, opposing brief), dated April 30, 1905, speaks of "the final struggle with outlawry on which we are *now* entering."

Who is to determine such facts in such emergencies? These grave occasions of state brook no delay. If the summary things which governments are occasionally called upon to do must be stayed until all the doubters and questioners (whether from motives sincere or not) are answered satisfactorily to themselves, there would be frequent anarchies everywhere. The judicial machinery is too tardy for the sudden demand, it is not fitted to sift and divide such emergencies sharply. The existence of the exigency as a fact is not within the established scope of judicial inquiry. It does not

act on such matters or respond to such calls. The executive intelligence and discretion, the conscience and good faith of the political departments, must be trusted.

And when two legislatures combine in a grant of power and in the initiation of the Executive act, and the designated Executive authority determines deliberately that the occasion and due moment have arrived, and thereupon proceeds to act, the fullest demands of cautious checks and proper safeguards have been met. It is hardly necessary to say that the possible abuse of the power is no objection to its existence and exercise. The presumption always is that such governmental acts are duly and rightly done. These are broad statements of the principle, and closer analysis must now be made. What is the intent of the law? If it means to commit the necessary determination of fact to the Executive alone, is it valid?

The provision of the Constitution as to habeas corpus is that—

> The privilege of the writ of habeas corpus shall not be suspended unless in cases of rebellion or invasion the public safety may require it. (Art. 1, sec. 9, cl. 2.)

The act of Congress recognizing for the Philippines this general restriction on the suspension of the writ grants the authority to suspend the privilege "when in cases of rebellion, insurrection, or invasion the public safety may require it." The authority is granted to the President, and to the

governor-general, with the approval of the Philippine Commission, "wherever during such period the necessity for such suspension shall exist." Congress was providing for the known conditions in the Philippines. Insurrections were notoriously frequent—that is, minor rebellions. Congress noticed the fact, and provided for it by adding the word "insurrection" to the phrase in the Constitution, and gave the power specifically, not leaving it to the doubtful question whether or not this provision of the Constitution applies to the Philippines.

It seems to me certain that by such a law Congress necessarily intends to commit to the President, and here to the governor of the Philippines as well, the determination of the exigency and the question whether the occasion exists. In the civil war instance the rebellion was raging and appears on the face of the act (*post*), and no one could doubt that the constitutional occasion existed. The President was only called upon to determine when and where the public safety required suspension. His right to determine that question under the authority of the act by his own judgment alone was sustained.

In the present Philippine case the danger did not exist at the moment, but was anticipated and provision made accordingly, the Executive function being extended beyond the determination of the period during which the public safety required suspension to embrace the fundamental exigencies

of rebellion, insurrection, or invasion. That is plainly what this act intends. Is it valid? It is, of course, if the exact limitation of the Constitution does not control, or if the act is consistent with that limitation.

THE PRECISE LIMITATION OF THE CONSTITUTION DOES NOT CONTROL.

The court itself has said that some limitations of the Constitution are applicable to the Philippines and our other insular territories, and some are not. To which class does this provision of the Constitution belong? I do not mean to argue again minutely this issue of the insular cases. But I shall endeavor to show from the principles suggested by members of the court why this provision of the Constitution *totidem verbis* should not be applied to the Philippines.

1. The rule of the Constitution is, it is true, a prohibition in one aspect, but it is a negative pregnant. It is also a grant or recognition of affirmative power in another aspect. Is it, as a prohibition, one of those which "go to the very root of the power of Congress to act at all, irrespective of time or place?" Is it like the flat prohibitions that "no bill of attainder or ex post facto law shall be past?" and "no title of nobility shall be granted by the United States?" There is no doubt that the prohibition against double jeopardy in the fifth article of the Constitution is a general and unlimited prohibition, and contains no exception

recognizing affirmative power. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

That provision is just as essential and fundamental to personal liberty as the restriction on the suspension of the writ of habeas corpus; and yet in the *Kepner* case (195 U. S., 100, 117, *et seq.*) the court rests the validity of the guarantee against double jeopardy in the Philippine Islands, not on the Constitution but upon the instructions of President McKinley and the jeopardy clause of the same section of the act of 1902 now before the court, which incorporated, with other fundamental guarantees, as the so-called Philippine bill of rights, language equivalent to the constitutional provision on the subject—"And no person for the same offense shall be twice put in jeopardy of punishment." The court said:

> It is not necessary to determine in this case whether the jeopardy provision in the bill of rights would have become part of the law of the islands without Congressional legislation. The power of Congress to make rules and regulations for territory incorporated in or owned by the United States is settled by an unbroken line of decisions of this court and is no longer open to question [citing *American Insurance Co.* v. *Canter* and other authorities].

So that from the general discussion of that opinion, and from this passage as well, it is clear that the court prefer to rest that constitutional

provision as applicable to the Philippine Islands, not upon the Constitution itself, but upon the act of Congress.

Again, in the discussion of the opinion of the court in *Downes* v. *Bidwell* upon this point of the applicability of various provisions of the Constitution to Territories (182, U. S., 279), the court notes, citing the cases of certain Territories, that—

> In all these cases, as well as in Territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights.

It seems clear, then, that the court would in this case also rest the law regarding habeas corpus in the Philippines not upon the Constitution, but upon the act of Congress. And that view would not seem to be weakened because in the double jeopardy case the provisions of the Constitution and of the statute are substantially alike, while the habeas corpus provision of the act differs from the Constitution.

2. It is certain that Congress was not of opinion that the Constitution took effect in the Philippines of its own force; otherwise they would not have enacted this particular provision or any other of the Bill of Rights clauses of section 5 of this act.

This is also shown by the passage just cited from *Downes* v. *Bidwell*, and section 1891, Revised Statutes, manifests generally the same attitude of Congress.

3. I do not appeal to the argument *ab inconvenienti;* but since Congress has put in force in the Philippines the vital spirit and meaning of the constitutional provision on this subject, modifying it only so as to fit the local circumstances and to recognize the practical difficulties or impossibilties in the way of the determination of particular exigencies by Congress itself, because of the distance of the Philippines from the United States, is not that sufficient in the legal view as well as wise and necessary in the practical view? But we stand on the unequivocal determinations of this court respecting other fundamental guarantees not to be distinguished from this in regard to essentiality, that the act of Congress controls and constitutes the Philippine constitution; that Congress may make such rules and regulations for the government of the Territories. (*Kepner* case as cited; and see *Dorr* case, *ubi infra*.)

If, then, the exact provision of the Constitution is not in force in the Philippines *ex proprio vigore*, the act of Congress validly constitutes the law on the subject for those islands, and the only real question is as to the intent of Congress, to be construed in the light of established principles and past adjudications respecting executive determinations of fact under legislative authority. If,

with reference to this country, and the unquestioned application of the Constitution, there is some doubt, as exprest in the past, whether the President could judge even of the exigency whether the public safety now required the suspension of the writ, and very grave doubt whether Congress itself was not required to judge of the underlying exigencies, viz, rebellion or invasion, then as to the Philippines these doubts are resolved by the act of Congress, which is not limited by the Constitution, and of which the manifest intent is that all the necessary exigencies should be judged of by the President or the Philippine authorities.

IT IS WELL SETTLED THAT THE EXECUTIVE DETERMINATION IN KINDRED MATTERS IS BEYOND JUDICIAL REVIEW.

We come, then, to the claim that the Executive may not judge of the exigency finally and conclusively; that the courts may review the matter and decide whether the exigency in fact exists. This claim bears upon the power and intent of Congress, and prior adjudications have settled the principle.

The leading cases are *Martin* v. *Mott* (12 Wheat., 19) and *Luther* v. *Borden* (7 How., 1, 42, 45). In the former the statute provided that whenever the United States shall be invaded or be in danger of invasion it shall be lawful for the President to call forth such number of the militia of the States most convenient to the place of danger as he may judge

necessary to repel the invasion and to issue orders to the officers of the militia as he shall think proper. Speaking of the power, the court said (*per* Mr. Justice Story):

> The power thus confided by Congress to the President is doubtless of a very high and delicate nature. * * * It is in its terms a limited power, confined to cases of actual invasion or of imminent danger of invasion. If it be a limited power, the question arises, By whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question upon which every officer to whom the orders of the President are addrest may decide for himself and equally open to be decided by every militiaman who shall refuse to obey the orders of the President? 'We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President and that his decision is conclusive upon all other persons. * * * The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union (pp. 29–30).
>
> The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision and in effect defeat it. Whenever a statute gives a discretionary power to any person to be exercised by him upon his

> own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself (pp. 31–32).

This case itself shows and has always been regarded as deciding that such a determination of the Executive could not be *judicially* questioned. (Pomeroy's Constitutional Law, sec. 476; Tucker on the Constitution, p. 581.)

It is evident that in the opinion of this court such was the scope of the decision in *Martin* v. *Mott*. In *Luther* v. *Borden* the court said:

> After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right?
>
> If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It can not, when peace is restored,

punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

* * * * *

A question very similar to this arose in the case of *Martin* v. *Mott* (12 Wheat., 29–31). The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. The power given to the President in each case is the same, with this difference only, that it can not be exercised by him in the latter case except upon the application of the legislature or executive of the State. The case above mentioned arose out of a call made by the President by virtue of the power conferred by the first clause; and the court said that "whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and we think are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President, in exercising this power, shall fall into error, or invade the rights of the people of the State, it would be in the power of Con-

> gress to apply the proper remedy. But the courts must administer the law as they find it (pp. 43–45).

I do not deem it necessary to cite other decisions in support of this principle. A long list of them is given in the opinion of the court below.

THERE IS NO ILLEGAL DELEGATION OF LEGISLATIVE POWER.

This notion is advanced in one of the cases cited below (*In re Oliver*, 17 Wis., 703), but was rejected by the court. It was urged that by the act of 1863, *post*, Congress, instead of suspending the writ only, attempted to confer upon the President the power to do so, which was claimed to be void as an attempt to delegate legislative power to the Executive.

The rule is well stated by Judge Ranney, speaking for the Supreme Court of Ohio, as follows:

> The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made. (*Railroad* v. *Commissioners*, 1 Ohio Stat., 88.)

The court quoted that statement with approval in *Field* v. *Clark* (143 U. S., 649, 693–694), as also the following passage from the opinion in *Locke's Appeal* (72 Pa. St., 491, 498):

> To assert that a law is less than a law because it is made to depend on a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is past relating to a state of affairs not yet developed, or to things future and impossible to fully know. * * * The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.

See also *Buttfield* v. *Stranahan* (192 U. S., 470, 496).

It was declared in *Slack* v. *Railroad* (13 B. Mon. 1, 23, 24) that:

> It is not essential to the character and force of a law that the legislative enactment should itself command to be done everything for which it provides. The legislative power to command a particular thing to be done includes the power to authorize it to be done. The act done under authority conferred by the legislature is precisely as legal and valid as if done in obedience to a legislative command. * * * So far as such a statute confers authority and discretion, it is as ob-

> ligatory from the first as the legislative power can make it; and although its further practical efficacy may depend upon the discretionary act of some other body or individual, it is not derived from that discretion, but from the will of the legislature which authorized the act and prescribed its consequences.

Again, in *Blanding* v. *Burr* (13 Cal., 343, 357) the court says:

> Laws may be absolute * * * or they may be subject to such conditions as the legislature may impose. * * * They are not the less perfect and complete when past by the legislature, tho future and contingent events may determine whether or not they shall ever take effect. In anticipation of invasion or insurrection or local disturbance, or other emergencies requiring the exercise of special powers, acts are constantly past, and yet no one has ever questioned their validity as laws because dependent in their operation upon occasions which may never arise.

In *Moers* v. *City of Reading* (21 Pa. St., 188, 202) it was held that:

> Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it can not be said that the exercise of such discretion is the making of the law.

In other words, the law has been in fact enacted. Its application or enforcement merely has been postponed until the happening of a certain contingent event which may be judged of validly by other than the legislative authority. Broadly, the matter falls under the discussion in Cooley on "Delegating legislative power," viz:

> A statute may be conditional and its taking effect may be made to depend upon some subsequent event;

and, quoting from an authority not clearly specified—

> When a law is made to take effect upon the happening of such an event, the legislature, in effect, declare the law inexpedient if the event should not happen. * * * They appeal to no other man or men to judge for them in relation to its present or future expediency; they exercise that power themselves, and then perform the duty which the Constitution imposes upon them. (Cooley, Const. Lim., 6th ed., pp. 137–138, 142.)

So, here, the law is made to depend on a future event; the power and discretion to judge of that event are committed to the Executive; there is no delegation of legislative power.

But if the notion of a delegation of legislative power could find lodgment here, then the reply is that the frame of government as it now exists in the Philippines has been before this court in vari-

ous cases, and no intimation has come from the court that Congress has exceeded the due bounds in empowering the Philippine government to legislate. By various statutes familiar to the court, Congress has taken over and adopted as its own, with more ample grants of power, the territorial executive government, which continued in the Philippines *ex necessitate* after the Spanish war.

The court has determined that the war power was *functus officio* after the war ended, notwithstanding the native insurrection against our authority; that the executive had no right under the war power to collect duties on imports from the United States after April 11, 1899; and that other sections of this act of July 1, 1902, did not ratify such collections. (*Lincoln* v. *United States*, 197 U. S., 419; same caption, 202 U. S., 484.) The court has settled the law as to double jeopardy in the Philippines. (*Kepner* v. *United States*, 195 U. S., 100; *Trono* v. *United States*, 199 U. S., 521.) But in no case has the court considered and determined adversely the grant of power by Congress to the Philippine authorities to legislate or condemned their exercise of that power. On the contrary, this court has approved the exercise of this legislative power in its broadest aspects by the Philippine Commission. (*Dorr* v. *United States*, 195 U. S., 138, 143, 149, 153.)

OTHER ADVERSE CONTENTIONS; REVIEW OF CIVIL WAR SITUATION; AND CONCLUSIONS.

It is suggested in the dissenting opinion that there is an essential difference between the power given by Congress to the President as Commander in Chief under the Constitution to call men into military service, and the power given by the Constitution to Congress to suspend the writ of habeas corpus so as to prevent one in custody from having his detention inquired into by the courts. *Ex parte Milligan* is cited as authority for the contention that the suspension of habeas corpus is subject to judicial review, and that the Executive does not possess the power to decide exclusively whether a state of insurrection exists or not.

Another view advanced is that prior to the passage of the act of July 1, 1902, the Philippine Commission possest the power absolutely to suspend the writ and even to repeal the law which authorized it to be issued, citing *In re Calloway* 1 Phil. Rep., 11; that the act of Congress was not a grant of power but a restriction, and to hold that the Commission still has the same power of suspension as before is to make the act of no effect and practically to repeal it.

As to the latter point it is sufficient to say that in the *Calloway* case (which would not be controlling authority here in any event), no question whatever is raised about the power of the Philippine Commission to suspend the writ of habeas

corpus at any time. That case simply decided that under General Orders, No. 58, as amended, the courts of the Philippine Islands have no authority to release persons imprisoned by military authority. The opinion also notes that under article 17 of the Philippine Commission's judiciary act of June 11, 1901 (No. 136, 1 Laws of Phil. Com., p. 252), the Supreme Court of the islands shall have original jurisdiction to issue habeas corpus and other writs in accordance with the code of civil procedure, but that the code was not yet in force at that time. There is not a word about the power to suspend the writ.

The introduction of the writ into the Philippines was as follows:

General Orders, No. 58, military governor of the Philippine Islands, dated April 23, 1900, provided (sec. 77):

> Every person unlawfully imprisoned or restrained of his liberty under any pretense whatever may prosecute a writ of habeas corpus, in order to inquire into the cause of such imprisonment or restraint.

Then followed the provision of the Philippine Commission's act just referred to; and the final step was the provision of section 5 of the act of July 1, 1902, now before the court.

So that it is a mistake to say that the Philippine Commission previously had absolute power to suspend, which the act of Congress restricted, thus conveying the impression that the act was a nega-

tive thing withdrawing power, whereas it is manifest that it grants the power but appends, substantially, the constitutional limitations.

A perfect illustration of this double aspect is given in the charge of the Lord Chief Justice of England in the case of Nelson and Brand (London, 1867, p. 80). There was a "Militia act" of Parliament recognizing martial law, and it provided in effect that martial law "shall not in future be declared or imposed but by the opinion or advice of a council of war consisting as aforesaid." Upon this Chief Justice Cockburn comments as follows:

> Now, it is true this is in one sense a restraining statute. It takes away from the governor the power to proclaim martial law except upon a given condition. It subjects his authority in that respect to the assent of a council of war to be summoned for the purpose. But then, upon the other hand, it plainly indicates that the exercise of martial law is considered as within the province of the governor, etc.

This statute in all respects presents a close analogy to our own, and shows clearly enough, as Lord Cockburn thought, what the intent of a legislature is in thus committing discretion to an executive, subject to the approval of his council.

In England the power to suspend the writ of habeas corpus belongs exclusively and without limitation to Parliament. (1 Bl. Com., p. *136; Chief Justice Taney in the *Merryman* case, citing the passage from Blackstone.)

> Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether exigency had arisen must exclusively belong to that body. (Commentaries on the Constitution, 5th ed., vol. 2, pp. 214–215, and notes.)

It appears from one of the notes to this passage that Mr. Jefferson was opposed to the power to suspend; that the only attempt to suspend the writ prior to the civil war was made during his administration as a result of his message to Congress on the Burr conspiracy. A bill to suspend passed the Senate, but was rejected in the House. Chief Justice Taney, in the *Merryman* case, comments as follows upon this matter:

> When the conspiracy of which Aaron Burr was the head became so formidable and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed on his part no power to suspend it, but communicated his opinion to Congress with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject and determine whether the public safety required it. And in the debate which took place upon the subject no one suggested that Mr. Jefferson might exercise the power himself if, in his opinion, the public safety demanded.

In the controversy over President Lincoln's famous order of April 27, 1861, authorizing General Scott to suspend habeas corpus within the military lines about Washington if he should meet with resistance, it was the opinion of Mr. Binney (Privilege of the Writ of Habeas Corpus; Philadelphia, 1862), and of other eminent lawyers and statesmen, that the President had the right not only to judge whether the exigency had arisen, but also to suspend the writ upon such determination and without an act of Congress authorizing him to do so. It was held otherwise, however, by Chief Justice Taney in *Merryman's* case (*Ex parte Merryman*, Taney, 1246), and the Chief Justice filed an opinion denying the authority of the President to suspend the writ in his own discretion, and stating his reasons for the view that the authority was vested in Congress. To the same effect is the decision in *Ex parte Benedict* (Fed. Cas., No. 1292).

Now, it must be conceded that the weight of judicial authority is that under the Constitution the power to suspend the writ or to authorize the suspension of the writ belongs to Congress and not to the President. The reasoning and conclusion of Chief Justice Taney, invoking the *semble* of Justice Story, *ante*, and the statement of Chief Justice Marshall in *Ex parte Bollman*, *post*, have prevailed, notwithstanding the sharp challenge which they met at the time and the weighty adverse opinions. But there is a great difference between an order of the Executive assuming to act alone, like President

Lincoln's order of 1861, and an order issued in pursuance of an act of Congress. Congress has exercised the power here, and there is no question before the court as to the existence of a broad and inherent power in the Executive alone. That claim was born of the sudden emergencies and the life and death struggle of a great war, and was probably settled forever by the judicial decisions, the subsequent legislative acts, and the Executive acquiescence and action thereunder.

The only other law which Congress has ever past authorizing the suspension of the writ is the act of March 3, 1863 (12 Stat., 755), which provided (sec. 1):

> That during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case thruout the United States or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said

> writ so long as said suspension by the President shall remain in force and said rebellion continue.

In pursuance of this authority, President Lincoln issued his proclamation of September 15, 1863 (13 Stat., 734), declaring that "the public safety does require that the privilege of the said writ shall now be suspended thruout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody either as prisoners of war, spies, or aiders or abettors of the enemy," etc.; and thereupon it was declared that the privilege of the writ was suspended, and that this suspension shall continue thruout the territory of the said rebellion or until this proclamation shall by a subsequent one to be issued by the President of the United States be modified or revoked. The act of 1863 contained numerous other provisions regulating personal rights and judicial proceedings in cases arising under the exercise of the power.

Considering now the cases arising under the act of 1863, in *McCall* v. *McDowell* (1 Abb., 212; Fed. Cas. No. 8673), Judge Deady took occasion to follow approvingly Chief Justice Taney, saying:

> When the occasion arises—a rebellion or invasion—whether "the public service" requires the suspension of the writ or not is confided to the judgment of Congress, and

> their action in the premises is conclusive upon all courts and persons [citing *Ex parte Merryman* and Story on the Constitution] * * * That proclamation [an earlier one, of September 24, 1862 (13 Stat., 735)] professes to suspend the writ of habeas corpus and to declare martial law. The expression martial law may be past over as merely cumulative. It means nothing but the absence of law. But the President of the United States has no authority to suspend the privilege of the writ, except as authorized.

But Judge Deady also says that Congress may suspend directly or may commit the matter within the proper limits to the President, and, sustaining the power of Congress and the authority of the President under the act of 1863, he says:

> The suspension enables the Executive, without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in forming the rebellion or inviting the invasion to the iminent danger of the public safety.

The exigency of the rebellion had been determined by the flagrant fact and appeared on the face of the act; but there can be no doubt that in the learned judge's opinion the "proper limits" included the right of the President to determine whether the public safety required suspension.

Ex parte Field (5 Blatchf., 63; Fed. Cas. No.

4761) took the view with reference to the proclamation of 1862 that the President could validly act without previous authority from Congress, relying on *Martin* v. *Mott* and *Luther* v. *Borden* and treating *Ex parte Bollman* and *Ex parte Merryman* as not conclusive. To the same effect was *Re Dugan* (6 D. C., 131), which held that the power to suspend the writ under the Constitution is executive.

What the Chief Justice said in *Ex parte Bollman* was that the first Congress of the United States, sitting under a Constitution which contained the provision about habeas corpus, must have felt peculiarly the obligation of providing efficient means by which the great constitutional privilege should receive life and activity, and under the impression of this obligation they had given to all the courts the power of awarding the writ; and that (4 Cr., 101)—

> If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends upon political considerations on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty and must obey the laws.

Cooley thus comments on the matter:

> It is competent also and sometimes necessary to confer authority on the Executive or

> the judiciary to determine in what cases a particular law shall be applied. For example, the act of Congress suspending the privilege of the writ of habeas corpus during the late civil war did not declare a general suspension—which would have been entirely needless and therefore an act of tyranny—but it empowered the President to exercise his judgment and supersede the writ in particular cases as he might deem the public interest to require. A similar discretionary power is conferred upon the President, or upon one of the heads of department, in many cases. (Const. Law, pp. 111–112.)

It was held in *In re Kemp* (16 Wis., 359–367) that "the President has no power in the sense of the ninth section of the first article of the Constitution of the United States to suspend the privilege of the writ of habeas corpus. It is, in my judgment, a legislative and not an Executive act, and the power is vested in Congress. Upon this question it seems to me that the reasoning of Chief Justice Taney in *Ex parte* Merryman is unanswerable."

This case arose before the act of 1863 was past.

In *In re Oliver* (17 Wis., 703, *ut supra*) the court exprest great doubt whether the power to determine whether the emergency has arisen when the privilege may be suspended is not one of those essential trusts confided to the legislature which can not be delegated, but reached the conclusion that "altho this act [of 1863] professes to confer

on the President authority to suspend the privilege of the writ whenever in his judgment the public safety should require it during the present rebellion, yet that it is itself an expression of the legislative judgment that the time has already arrived when the public safety requires the legislature to provide for a suspension, and that it does provide for a suspension, not absolute, but to take effect according to the judgment of the President whether the authority conferred should be exercised in particular cases or not. * * * Altho the language of the act as it now is affords * * * ground for a mere verbal argument that it was an attempt to transfer the entire legislative function to the executive, its real substance and effect are the same as they would have been in the form supposed. The law itself suspends the right in those cases where the President in the exercise of the discretion conferred upon him elects to have it suspended."

Now, as to *Ex parte Milligan* (4 Wall., 2), the stress of that decision rests upon an entirely different matter. The point adjudged was that a resident of a loyal State where the Federal courts were meeting and peacefully transacting their business could not constitutionally be tried and punished by a military commission; that the habeas corpus act of 1863 itself (secs. 2 and 3) forbade this and gave the Circuit Court for Indiana complete jurisdiction to adjudicate the case; that therefore the writ was properly issued and the

petitioner must be discharged. This is what the court said as to the suspension of the writ:

> The public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it and detained suspected persons in custody without trial. But his authority to do this was questioned. * * * It was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances * * * that this law was past. The President was authorized by it to suspend the privilege of the writ of habeas corpus whenever in his judgment the public safety required, and he did, by proclamation bearing date the 15th of September, 1863, reciting among other things the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of anyone, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.
>
> It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ and when the citizen was at liberty to invoke its aid.
>
> The second and third sections of the law are explicit on these points. The language used is plain and direct and the meaning of the Congress can not be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a

writ of habeas corpus; but it was not contemplated that such person should be detained in custody beyond a certain fixed period unless certain judicial proceedings known to the common law were commenced against him. * * * Not one of these safeguards [of the Constitution] can the President or Congress or the judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every government that in a great crisis, like the one we have just past thru, there should be a power somewhere of suspending the writ of habeas corpus. * * * In the emergency of the times an immediate public investigation according to law may not be possible, and yet the peril to the country may be too imminent to suffer such persons [enemies of the Government counseling resistance] to go at large. Unquestionably there is then an exigency which demands that the Government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say, after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law. * * *

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the writ of habeas corpus does not suspend the writ

itself. [See also on this point *Re Fagan* (2 Sprague, 91); *Re Dunn*, (25 How. Pr. 467).] The writ issues as a matter of course, and on the return made to it the court decides whether the party applying is denied the right of proceeding further with it (pp. 115, 125–126, 130–131).

The concurring opinion emphasizes the view that Milligan's right to the writ came within the precise letter and intent of the act of Congress. "The express terms of the act of Congress required this action of the court."

> The first section of the act authorized the suspension of the writ of habeas corpus generally thruout the United States. The second and third sections limited this suspension in certain cases within States where the administration of justice by the Federal courts remained unimpaired. In these cases the writ was still to issue and under it the prisoner was entitled to his discharge by a circuit or district judge or court, unless held to bail for appearance to answer charges. No other judge or court could make an order of discharge under the writ. Except under the circumstances pointed out by the act, neither circuit nor district judge or court could make such an order. But under those circumstances the writ must be issued and the relief from imprisonment directed by the act must be afforded. The commands of the act were positive and left no discretion to court or judge. * * *
>
> We assent fully to all that is said in the

> opinion of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur also in what is said of the writ of habeas corpus, and of its suspension, with two reservations: (1) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2) that there are cases in which the privilege of the writ being suspended, trial and punishment by military commission, in States where civil courts are open, may be authorized by Congress, as well as arrest and detention (pp. 135, 137).

It is thus clear, both from the opinion of the court and from the concurring opinion, that the condemnation of the court is directed against the imposition of martial law and the trial of civilians by military commissions in peaceful districts, altho' war is elsewhere flagrant; and that Milligan's right to the writ and his right to be discharged under it rested upon the express provisions of the very law which authorized the President to suspend the writ. The court recognize the power to suspend the writ as fully as the right of trial by jury, and intimate nothing against the power of Congress or the authority of the President in the matter. No argument can be based on the *Milligan* case which is adverse to the Government contentions in the present case.

As to later cases—

The constitution of Idaho provides that "the

privilege of the writ of habeas corpus shall not be suspended unless in cases of rebellion or invasion the public safety requires it, and then only in such manner as shall be prescribed by law." (Art. I, sec. 5.) No law appears to have been enacted prescribing the manner in which the writ should be suspended, but an act was past (sec. 5164, Penal Code; 1887 R. S., sec. 7406, 1st sess., p. 240, sec. 46) giving the governor the authority to proclaim an insurrection in any county when he is satisfied that the execution of civil or criminal process has been forcibly resisted by bodies of men. The Supreme Court of the State held (*In re Boyle*, 45 L. R. A., 832) that such a proclamation imposed martial law and suspended habeas corpus, and that the governor's action would not be inquired into or reviewed. Exactly the opposite conclusion was reached in *Ex parte Moore* (64 N. C., 802); but the constitution of North Carolina provides that "The privilege of the writ of habeas corpus shall not be suspended," and it was held that such express provision could not be abrogated and made of no force by an implication from any other provision.

It seems clear from this review that the great names of Marshall and Taney are authority for the contention that Congress itself must judge of all the exigencies, must determine the fact of invasion or rebellion, and must say when the public safety requires the action. But perhaps their declarations mean no more than that Congress must authorize and that the Executive can not act with-

out some authority from Congress. In *Ex parte Bollman* the matter was not presented at all, and in *Ex parte Merryman* the President had acted without any authority whatever from Congress. On the other hand, proceeding under this authority, the power of the President has been sustained where the face of the act expressly authorizes him to determine in his sole discretion whether the public safety requires action. This is the undoubted effect of *Milligan's* case and the other authorities which have considered the act of 1863. It may indeed be suggested that if there is an enabling statute, either in some existing emergency or for one contemplated to arise, and the President may constitutionally determine the exigency of the public safety, he may with equal right determine whether the progress of a rebellion or threat of an invasion presents a degree of danger which creates the constitutional occasion. At all events, the subject may be digested as follows, and, I submit, accurately:

It has been declared and held that the President may not suspend the privileges of the writ of habeas corpus without the authority of an act of Congress. It has been decided that, so authorized, he may determine at his discretion whether the public safety requires suspension and suspend the writ accordingly.

It has not been decided that, so authorized, he may not determine whether the exigency of invasion or rebellion has arisen. There can be no

doubt of the intent of the act for the Philippines, and it is not subject to the precise limitations of the constitutional provision. It adopts and applies to the Philippines the vital spirit and meaning of the constitutional provision.

The question noted at the outset thus practically becomes the question whether the act is constitutional. The answer is in the affirmative. The statute is consistent with the Constitution, because the exact limitation of the Constitution does not apply to the Philippines, and because Congress in thus legislating acted under the constitutional power conferred upon it "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Governor Wright's proclamation of January 31, 1905, was revoked as soon as that step could safely be taken. His proclamation of October 19, 1905, declares:

> Whereas the ladrone bands which up to a recent date infested the provinces of Cavite and Batangas have been practically destroyed and the members thereof killed or captured or have surrendered, so that the necessity for the continuance of the suspension of the writ of habeas corpus in the aforesaid provinces which was made necessary by the conditions prevailing on the thirty-first day of January last no longer exists:
>
> Now, therefore, I, Luke E. Wright, governor-general of the Philippine Islands, be-

> ing duly authorized and empowered thereto by the Philippine Commission, do hereby proclaim the revocation of the suspension of the writ of habeas corpus in the provinces of Cavite and Batangas which was made by me on the thirty-first day of January last.

If the application herein had been renewed after October 19, 1905, and denied, or if the writ had been granted and then dismissed, that determination would necessarily have proceeded on other grounds than the suspension of the writ, and the present case would have died from inanition.

Is there not, then, a mere moot question here, which the court will decline to consider under well-settled precedents? (*California* v. *San Pablo and Tulare R. R.* 149 U. S., 308, 314; *Mills* v. *Green* 159 U. S., 651, 653; *Kimball* v. *Kimball* 174 U. S., 158, 161; *Codlin* v. *Kohlhausen* 181 U. S., 151.)

I beg to submit that the writ of error must be dismissed for want of jurisdiction, or because the inquiry is now merely a moot point; or that the judgment below must be affirmed.

HENRY M. HOYT,
Solicitor-General.

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